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IN THE

Supreme Court of the United States

October Term, 1958.

No. [redacted] 111

MAX SCHAFFER and NORMAN SCHAFFER,
Petitioners,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

MAX SCHAFFER and NORMAN SCHAFFER, your petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on April 21, 1959.

OPINION BELOW.

The opinion of the court below (Appendix A, *infra*, pp. A1-A16) has not yet been reported.

JURISDICTION.

The judgment of the court below (Appendix B, *infra*, p. A17), was entered on April 21, 1959. A petition for rehearing was denied on May 18, 1959 (Appendix C, *infra*, p. A18). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Rule 8(b) of the Federal Rules of Criminal Procedure recognizes and reflects the fundamental right of a criminal defendant to be tried alone and the justified opprobrium attaching to the mass trial. After a conspiracy count against several defendants is dismissed for lack of evidence, is it proper to continue a joint trial and to submit to a single jury the remaining counts, charging each defendant with an independent and unrelated offense?

2. Where the District Court has plainly refused to submit an issue of fact to the jury for its determination, can the Court of Appeals properly affirm a conviction by reviewing the evidence and making a finding on that issue of fact adversely to the defendants?

3. The National Stolen Property Act makes certain interstate transportation a federal crime if the goods exceed $5,000 in value. Can this statute be interpreted to permit a conviction where the value element of the offense is established by adding together the values of several separate and distinct transactions, no one of which constituted a federal offense since the goods involved were valued at less than $5,000?

STATUTES AND RULES INVOLVED.

1. Section 2311 of Title 18, U. S. Code, provides in pertinent part as follows:

> *§ 2311. Definitions*
>
> As used in this chapter:
>
> • • • • •
>
> "Value" means the face, par, or market value, whichever is the greatest, and the aggregate value of all goods, wares, and merchandise, securities, and money referred to in a single indictment shall constitute the value thereof.

2. Section 2314 of Title 18, U. S. Code, as amended, provides:

> *§ 2314. Transportation of stolen goods, securities, monies, or articles used in counterfeiting*
>
> Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or
>
> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more; or
>
> Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities, know-

ing the same to have been falsely made, forged, altered, or counterfeited; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security, or any part thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

3. The Federal Rules of Criminal Procedure are as follows:

Rule 8. Joinder of Offenses and of Defendants

(b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Rule 14. Relief From Prejudicial Joinder

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

STATEMENT OF THE CASE.

Petitioners, father and son, were partners in a women's clothing store in Lebanon, Pennsylvania. In the course of several months in 1953, they made periodic purchases of merchandise in New York City. Petitioners were indicted and convicted for transporting in interstate commerce wearing apparel of a value in excess of $5,000, knowing that it had been stolen, in violation of 18 U. S. C. § 2314.

Petitioners were brought to trial with two other persons, Marco and Karp, who had been indicted for similar offenses. Neither of the additional defendants had any relationship whatsoever with the petitioners. Nor were they connected with each other in any way. Marco had purchased goods to be sent to Bluefield, West Virginia. Karp had ordered goods shipped to Fall River, Massachusetts. In each of the three cases, the buyers from Pennsylvania, West Virginia and Massachusetts purchased some of the goods used in their respective stores from the same supplier in New York, who had other customers in addition to the petitioners and the two defendants.

A single indictment had been drawn for the three separate offenses in four counts. Count One charged the petitioners and the suppliers with violating 18 U. S. C. § 2314. Counts Two and Three made similar accusations against Marco and Karp, together with the suppliers. All three were tried simultaneously in a single trial and convicted.

The basis for this manifestly improper joinder of unrelated prosecutions was a fourth count in the common indictment. This charged that the petitioners, together with Marco and Karp and the suppliers, had conspired to violate 18 U. S. C. § 2314 by causing stolen goods to be transported in interstate commerce. The inclusion of this conspiracy count made possible a common trial which would otherwise have been a clear violation of Rule 8(b) of the Federal Rules of Criminal Procedure.

Prior to the trial, the three persons implicated as the suppliers were removed from the case. Two of them entered pleas of guilty (2a).[1] The charges were dismissed as to the third (4a). As tried, the case involved only the three sets of completely unrelated buyers.

The connecting link of the conspiracy charge was quickly eliminated from the case. The prosecution was unable to present even a *prima facie* case of conspiracy.[2] In the words of the trial judge, the Government did not "come anywheres close to the standard that [it had] to prove, either as to whether or not there were three separate conspiracies or just a general conspiracy" (12a). The trial judge, essentially of his own motion, ordered the conspiracy charge dismissed at the close of the prosecution's evidence (11a). The Government failed to show that the several defendants even knew each other, much less than they had conspired together. Despite objections that it would be prejudicial to the defendants to continue the trial on the substantive counts only (13a-14a),[3] the trial judge ordered the case to go forward as a joint trial.

It was stipulated by the Government and the defense (20a-21a) that no single shipment of goods to the petitioners was of a value of $5,000, that each shipment to the petitioners was of a value less than that sum, but that the total value of all the shipments made to them during the period alleged in the indictment exceeded $5,000.[4] Petitioners contended that the aggregation of these amounts was im-

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1. References to figures with the suffix "a" are to the printed Appendix filed by these petitioners. References to the filed but unprinted notes of testimony are prefixed by "Tr."

2. At the same time, the District Judge likewise dismissed a second indictment which charged petitioners, the suppliers and Marco and Karp with conspiring to violate 18 U. S. C. § 659. This indictment does not affect any of the issues in the case.

3. While the cited objection was made orally only by counsel for Karp, it had earlier been agreed, with the concurrence of the trial judge, that any objection taken on behalf of any defendant would inure to the benefit of all the defendants (10a-11a).

proper unless the prosecution proved that they had been made pursuant to a single plan or agreement so that the shipments thus had unity of purpose.

Jury instructions were submitted to the court by petitioners embodying this theory (Tr. 1611-1612, 1617-1618). The trial judge (Murphy, D. J.) refused to charge the jury on that issue. In a colloquy with counsel, he said:

> "What I have in mind, although I don't want to cut you off, is to give the case to the jury on the three substantive counts, and tell them that they have to find the value—and I suppose they will almost have to find it pursuant to the stipulation—that the aggregate value is over five, and you have to take exception to that part of the charge, and see what the jury does, and then we consider it again, because I am not too clear what the definition in 2311 really means. . . . I will charge it the way you want me to, Mr. Moran [Assistant U. S. Attorney]" (16a).

The instructions referred to the stipulation of the attorneys as establishing that the total value of shipments in each count exceeded $5,000. The jury was told to "rely" on that stipulation, even though no individual shipment was of a $5,000 value (58a).[5] Exception was duly made to the failure of the judge to give the instructions requested by the petitioners (63a).

Petitioners were convicted and sentenced to two years' confinement and to pay a fine of $10,000, following a verdict of guilty by the jury (69a).

The Court of Appeals for the Second Circuit (Swan, Medina, Waterman, JJ.) affirmed. The opinion by Judge

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4. A similar stipulation was made as to the other defendants, Marco and Karp (Tr. 1438-1441).

5. This was in accordance with the requested charge submitted by the Government which made no mention of conspiracy or agreement or course of conduct on aggregating the value of the several shipments. See Govt. Request No. 2 (Tr. 1602-1603).

Medina presents two grounds for the decision, both of which are necessary to support the judgment.

First, it was held that no decision is necessary on whether aggregation of the value of shipments is proper where they are separate and distinct, since the facts in this case are "perfectly clear" that the shipments to the petitioners were made according to a pre-arranged agreement.

Second, the court held that joinder of the independent prosecutions was proper, although ". . . it would have been clearly erroneous to try appellants together" in the absence of the conspiracy count. In the opinion of the court, error would have been committed only if the petitioners could demonstrate either that the conspiracy device had been used by the prosecution in bad faith or that the joinder led to more prejudice to the defendants than the court could perceive in the record.

In a petition for rehearing, petitioners contended that the first holding of the Court of Appeals is untenable. It rests upon a finding of fact by the appellate court rather than by the jury, clearly reversible error in light of *Grunewald v. United States*, 353 U. S. 391. The error here is compounded by the fact that the finding made by the Court of Appeals is on the precise issue which petitioners requested to have submitted to the jury and on which the District Court refused to charge. Rehearing was denied.

REASONS FOR GRANTING THE WRIT.

Rarely does a single case present three questions so plainly calling for review as does the present one:

First, the guilt or innocence of three unrelated sets of defendants was simultaneously tried in a mass trial, solely because the prosecutor included in the common indictment a count bracketing all the defendants with a conspiracy charge, so lacking in evidentiary support that the charge was dismissed at the close of the Government's case. We ask whether the deprivation of the substantial rights of the defendants to have separate determinations of their culpability and the violation of Rule 8(b) of the Federal Rules of Criminal Procedure can be upheld on so inadequate a pretext.

Second, the Court of Appeals sustained the conviction of these petitioners by themselves finding a crucial fact, in the face of the District Court's refusal of petitioners' request to permit the jury to resolve that precise factual issue. This disregard of so basic a principle of administration of federal criminal justice by the court below, so recently reversed here on the precise point, demonstrates the continuing necessity for supervision by this Court to insure the fairness of criminal processes.

Third, the question avoided by the Court of Appeals, through its "fact-finding," is the important question of the scope of the National Stolen Property Act (18 U. S. C., chapter 113). The statute defines the federal offense in terms of a monetary minimum of the value of the goods concerned and provides, further, for an aggregation of the values of several violations under some circumstances. The issue presented here is whether such aggregation is permissible, under the statute, in every and all circumstance, or whether it is proper only when the several transactions are connected by some general plan or agreement. A determination of the reach of a federal criminal statute as-

surely is of sufficient public importance to warrant review by certiorari.

First. The basic issue presented by this case concerns the proper limitations upon the use of a conspiracy charge to deprive persons accused of crime of their fundamental right to be free of mass trials. We ask that the case be brought to this Court for review because, in the words of Mr. Justice Frankfurter, it was tried ". . . in a way that raised an important question in the administration of federal criminal justice." *Bollenbach v. United States*, 326 U. S. 607.

The question is posed cleanly and sharply. As submitted to the jury the case involved only three totally unrelated substantive offenses. This joinder of independent causes, standing alone, was clear error, and the Court of Appeals so conceded. Not only would it violate Rule 8(b) of the Federal Rules of Criminal Procedure, but it would force each defendant to have his innocence or guilt decided in a mass trial, simultaneously with the determination of other unconnected cases.

The supposed justification for this manifestely erroneous procedure was the inclusion in the common indictment of a count charging all of the defendants with having engaged in a single conspiracy. The Assistant United States Attorney, opposing a pre-trial motion to sever, submitted an affidavit (filed with Record) that the Government had information that all the defendants were known to one another. The Court of Appeals, however, said that the entire record failed to disclose one shred of evidence that any of the defendants had the slightest knowledge of the existence of the others. The District Judge made the most descriptive remark of all. He declared that the Government had failed to "come anywheres close to the standard" of proof necessary to get to a jury (12a). Accordingly, he dismissed the conspiracy count at the close of the Government's case (12a).

The question comes down to whether the Government can claim the benefit of improper joinder of defendants by the simple stratagem of bracketing them with a conspiracy charge so flimsy that it fell far short of even getting to a jury. The Government should not have the windfall of prejudicial and inadmissible testimony against each defendant because of an unfounded charge of conspiracy.

It hardly needs elaboration that this type of issue is one which the Court has itself recognized as worthy of certiorari on many occasions. In *Grunewald v. United States*, 353 U. S. 391, 404, Mr. Justice Harlan wrote: "Prior cases in this Court have repeatedly warned that we will view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions. The important considerations of policy behind such warnings need not again be detailed." He cited, as illustrative cases, *Delli Paoli v. United States*, 352 U. S. 232; *Lutwak v. United States*, 344 U. S. 604; *Krulewitch v. United States*, 336 U. S. 440; and *Bollenbach v. United States*, 326 U. S. 607.

This case represents further drift in "the long evolution of that elastic, sprawling and pervasive offense"[6] of conspiracy. The decision below is wholly without precedent. The Court of Appeals cited 11 cases to support its conclusion (pp. A11-A12, *infra*). *Not one is on point.*[7] Each involved a situation where the conspiracy count was sub-

6. Jackson, J., in *Krulewitch v. United States*, 336 U. S. 440, 445.

7. Such decisions as there are on so plain a principle are, understandably enough, contrary to the position of the Court of Appeals. See *United States v. Welsh*, 15 F. R. D. 189, 190 (D. D. C.): ". . . different unconnected offenses not arising out of the same series of transactions may not be joined in an indictment in which two or more defendants are charged. There is a good reason for that restriction. This is no technical limitation. The purpose is to prevent mass trials."

See also *Coco v. United States*, 289 Fed. 22 (C. A. 8); *United States v. Geare*, 293 Fed. 997 (App. D. C.); *United States v. Harvick*, 153 F. Supp. 696 (D. N. Dak.); *cf. United States v. Dietrich*, 126 Fed. 664, 670 (D. Neb.).

mitted to a jury,[8] or where the several defendants were jointly charged in at least one of the substantive counts,[9] or where a single defendant was tried on several indictments, each of which charged similar offenses.[10]

In every one of the cited cases, there was still a proper basis for joinder of the multiple charges when the case was submitted to the jury. In this case, however, the sole basis for joinder of the defendants into a mass trial was *eliminated* at the close of the Government's evidence.

Petitioners contended below first that the continuation of the joint trial after dismissal of the conspiracy count constituted error as a matter of law. It is axiomatic that a defendant, who is denied the right to a trial unprejudiced by the simultaneous trial of unrelated defendants, has indeed been grievously injured.[11] Deprivation of such a substantial right cannot here be justified. All that was necessary to protect petitioners was a severance of the trial when the conspiracy count was dismissed. The slight inconvenience to the prosecution in such a procedure does not even approach the importance of the rights of the defendants. We maintain therefore that the courts below committed error as a matter of law.

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8. *Delli Paoli v. United States*, 352 U. S. 232; *Opper v. United States*, 348 U. S. 84; *Blumenthal v. United States*, 332 U. S. 539; *Berger v. United States*, 295 U. S. 78; *United States v. Bando*, 244 F. 2d 833 (C. A. 2); *United States v. Chieppa*, 241 F. 2d 635 (C. A. 2); *United States v. Lebron*, 222 F. 2d 531 (C. A. 2); *United States v. Nash*, 54 F. 2d 1006 (C. A., 2). (See the same case below, 51 F. 2d 253 (S. D. N. Y.), for more details.)

9. *United States v. Leviton*, 193 F. 2d 848 (C. A. 2); *Robinson v. United States*, 210 F. 2d 29 (D. C. Cir.).

10. *Dunaway v. United States*, 205 F. 2d 23 (D. C. Cir.).

11. More than half a century ago, this Court said in *McElroy v. United States*, 164 U. S. 76, 81, that "joinder cannot be sustained where the parties are not the same and where the offenses are in no wise parts of the same transactions and must depend upon evidence of a different state of facts as to each or some of them. It cannot be said in such case that all the defendants may not have been embarrassed and prejudiced in their defense, or that the jury may not have been distracted to their injury in passing upon distinct and independent transactions."

Petitioners also contended that there was specific prejudice in the record of this case. The Court of Appeals relied principally upon the repeated admonitions of the trial judge as proof of the lack of such prejudice. More than fifty cautionary instructions were gleaned from the record by the court of appeals own count (p. A11, *infra*). There is a wry paradox in this reasoning. The mere fact that so many instructions were necessary is itself the best evidence of the oppression to the petitioners.

Time and again, eminent authorities, familiar with the trial courtroom, have announced the impossibility of the mental gymnastics demanded from the jury by this type of instructions. Judge Learned Hand said it is "beyond their powers, or anyone else's." *Nash v. United States*, 54 F. 2d 1006, 1007. Mr. Justice Frankfurter, in *Delli Paoli v. United States*, 352 U. S. 232, 246, 247, said that too often admonition against misuse of testimony ". . . is intrinsically ineffective in that the effect of such nonadmissible declaration cannot be wiped from the brains of the jurors. The admonition therefore becomes a futile collocation of words . . ."[12]

On some occasions and for some purposes, the courts have permitted the formality of cautionary instructions to conceal their ineffectuality. Where protection of the defendants would require abolition of conspiracy as a crime, for example, the courts have reluctantly accepted the fiction of the effectiveness of the instructions to permit the continued existence *vel non* of the offense of conspiracy.

No such difficult choice is involved in this case. There is absolutely no reason to indulge in the pretension that the jury can carefully compartmentalize in their minds sev-

12. "The statement of facts in the Government's brief is punctuated by eight separate footnotes to explain that the testimony recited in the text was limited to one or another defendant. We doubt that any member of this Court, despite our experience in sifting testimony, can carry in mind what was admitted against whom, and we are confident that the jury could not." Mr. Justice Jackson in *Lutwak v. United States*, 344 U. S. 604, 620, 623.

eral unrelated cases. There is no policy requiring the extension of an unsatisfactory rule beyond the circumstances which gave rise to it.

Numerous other forms of specific prejudice can be pointed up in the record of this case. It is only necessary to read the prosecutor's summation (22a-49a) and the judge's charge (50a-64a) to see how, inescapably, what each defendant was shown to have done bore on what the other defendants were charged with doing.[13]

Petitioners maintain that they have been seriously prejudiced, both as a matter of law and as a matter of fact. They have been improperly joined under Rule 8(b) of the Federal Rules of Criminal Procedure and, under Rule 14, justice requires that the petitioners be afforded separate trials.

This, in bare outline, is the framework of the central issue in this case. Petitioners have been deprived of a fundamental right of a criminal defendant by being compelled to submit to a mass trial under conditions that were clearly erroneous. The procedural gimmick employed to accomplish this result was a conspiracy charge so lacking

13. At one important point in the jury charge, the District Judge lumped together all of the defendants: "For example, *as against all the defendants*, it [*i.e.*, the circumstantial evidence] says that the manufacturers' invoices, which Stracuzza says were included in the shipments, were an obvious indication that the goods were stolen, because of the manner in which they were obliterated or torn; also, that the prices that the defendants paid were so out of proportion to the true market value, and that the copying of the style numbers from the manufacturer's invoice was a further indication.

"It says, as to those defendants who were actually in the premises of Stracuzza, they must have known or at least should have known from the condition of the premises and the manner of the display of the goods that they were not legitimate, but stolen" (55a). (Emphasis added.)

Inasmuch as the supplier had testified that he did not tell any of the defendants that the goods had been stolen (55a), this element of the offense had to be proved circumstantially as to each defendant. The above quotation is the District Court's comment to the jury on that circumstantial evidence. The prejudice in grouping evidence on so personal a question as knowledge is too obvious to need elaboration.

in substance that the trial court dismissed it of his own motion with the remark that it fell far short of even a minimum standard. The implications of the unprecedented decision of the Court of Appeals cut broadly and deeply into the fabric of federal criminal justice. We respectfully submit that the question presented is one on which certiorari should be granted.

Second. Here, as in *Grunewald v. United States*, 353 U. S. 391, reversing *United States v. Grunewald*, 233 F. 2d 556 (C. A. 2), the Second Circuit has sustained a conviction on a factual theory never submitted to or passed upon by the jury. This case actually presents an aggravated instance of the error committed below in *Grunewald*, because here the basis of the Court of Appeals' affirmance was not only not submitted to the jury, but these petitioners' specific requests that the case be tried on that issue were totally denied by the District Judge (16a, 58a).

The instructions to the jury directed them to rely on the stipulation of the attorneys (20a-21a) as establishing the value of the goods for purposes of the definition of the offense (58a). Instructions submitted by the petitioners, which would have charged the jury that they must find the several shipments had been made according to a single plan or agreement before aggregating value, were refused by the trial court (Tr. 1611-1612, 1617-1618).[14] As the colloquy with the judge indicates (15a-17a), he rejected the interpretation of the statute that aggregation of shipments is proper only if made pursuant to a single plan or agreement and thus had unity of purpose.

14. We deem it appropriate to point out that we did not print the rejected instructions in our Appendix in the Court of Appeals. Because of the action of the District Court, the factual question whether the shipments to the petitioners were all pursuant to a single plan or agreement was thought to be out of the case. It was unforeseeable that the appellate court might sustain petitioners' conviction on a factual theory which had not only never been passed by the jury, but which had been withheld from the jury over petitioners' objection. Subsequent to the filing of the opinion below, we did put forward petitioners' rejected instructions in our petition for rehearing.

It is equally clear that the Court of Appeals affirmed the convictions by making *that finding of fact* which the lower court had refused to permit the jury to make. The language in Judge Medina's opinion is unmistakably clear (p. A7, *infra*):

> "We need not now decide what ruling should be made in a case where the transactions are truly 'separate and distinct.' Much may depend upon the facts of a particular case. Here, however, it is perfectly clear that the shipments with respect to each appellant were not 'separate and distinct.' Although the overall conspiracy between the Stracuzzas and the four appellants was not established, the proofs disclose as to each appellant a sufficient 'unity for the purpose of the statute.' All goods acquired by each appellant were acquired from the same distributor, Tony Stracuzza; all goods were acquired at the same discount according to a pre-arranged agreement; all shipments included within the indictment as to each appellant were concentrated within a specified time of no more than two and one-half months; each shipment had the same origin and destination; the merchandise shipped was all of the same type, ladies' and children's wear; and each appellant in negotiating with the Stracuzzas contemplated a number of transactions."

The language speaks for itself. No argument would make it less a finding of fact[15] nor more a plain usurpation of the functions of a jury.

This issue goes to the very roots of administration of criminal law. The relationship of judge and jury, and the respective responsibilities and functions of each, touch every prosecution. A very dangerous situation is presented when an appellate court undertakes to evaluate a cold record in order to make findings of fact. This Court had occa-

15. Petitioners sharply disagree with the factual finding of the Court of Appeals. See Petition for Rehearing, pp. 3-8. But what is more important, the case was not tried or submitted to the jury on the basis of aggregating shipments pursuant to an agreement.

sion to address itself to the question posed here in its decision in *Grunewald, supra.* Patently, the necessity for repetition of the principles there enunciated is unfortunately at hand. Sufficient indication of that necessity is derived from the fact that the same Court of Appeals decided both the *Grunewald* and this case.

Third. The real issue, which the Court of Appeals avoided by "fact-finding," is the important question of the scope of the National Stolen Property Act.

The issue here centers upon the meaning of the provision limiting the federal offense of transportation of goods in interstate commerce to shipments which exceed $5,000 in value. 18 U. S. C. §§ 2314, 2311.

No reasoned appellate decision has ever held that, in the absence of agreement giving several separate shipments "unity for the purpose of the statute," it is proper to aggregate the value of the shipments in order to reach the statutory minimum of $5,000. The court below expressly avoided any ruling on the point. "We need not now decide what ruling should be made in a case where the transactions are truly 'separate and distinct.'" The District Judge had earlier expressed grave doubts on the meaning of the statute. ". . . I am not too clear on what the definition in 2311 really means, where it says you can group these values together if they are included in one indictment" (16a).

The Fourth Circuit, admittedly in dictum, declared that the $5,000 value could not be established by simply adding together the values of discrete transactions. In *Andrews v. United States,* 108 F. 2d 511, 514 a case of conspiracy to violate the National Stolen Property Act, the court specifically said:

> "It is argued that no violation of the federal statute was committed or could have been the object of the conspiracy because the value of no one of the shipments was of a value of as much as $5,000. It is clear, however, that the various shipments made in 1937, which were of a total value in excess of $27,000, were not separate and independent transactions, but were made pursuant to the conspiracy between Sencindiver,

Andrews and Scher; and that this conspiracy gave them unity for the purpose of the statute. *While, of course, transactions which are entirely separate and distinct cannot be grouped for the purpose of establishing a value within the statute, they may be considered together where they are not separate and distinct but are the carrying out of a single plan or conspiracy.* The statute makes it a criminal offense to transport stolen goods of a value of $5,000 or more in interstate commerce; and it can make no difference that the transportation is accomplished by a number of different shipments, provided all are made pursuant to a single plan or agreement." [16] (Emphasis added.)

The action of the court below, in refusing to face the issue posed by the District Court, adds further evidence by implication of the difficulty encountered by lower courts in perceiving the proper meaning of the statutory scheme.

The legislative history of the National Stolen Property Act is less than lucid on the point in issue. It is known that the provision for aggregating amounts came into the Act as a product of compromise between the House and the Senate over the size of the monetary amount to be incorporated into the definition of the offense.[17] When those

16. To the same general effect are *Cartwright v. United States*, 146 F. 2d 133, 135 (C. A. 5) ("it is settled law that the value of things taken in separate larcenies can not be aggregated to make up one felonious larceny"), and *United States v. Thomas*, 135 F. Supp. 662, 663 (E. D. Pa.) (semble). The holding in *United States v. Segelman*, 86 F. Supp. 114, 124 (W. D. Pa.) is to the contrary, but without discussion.

17. Congress refused to pass a National Stolen Property Law which did not contain limitations on value, and it similarly refused to pass such a law which had a low $300 limitation. See H. R. 10287, H. R. Rep. No. 2528, 70th Cong., 2d Sess. (no limit); H. R. 119, H. R. Rep. No. 79, 71st Cong., 2d Sess. ($300 limit). Both bills passed the House; neither passed the Senate.

The measure which became the National Stolen Property Act of 1934 was recommended by the Attorney General with a $1,000 minimum or, alternatively, a $2,500 limit. S. Rep. No. 538, 73d

pressing for the highest amount, $5,000, prevailed, the provision for cumulating values was incorporated. The most likely interpretation of this legislative bargaining, therefore, would read the aggregation provision as a safeguard against efforts to evade the federal statute by keeping each shipment below $5,000 in value. Such an evasive tactic would necessarily arise out of an overall plan or agreement to transport goods worth more than $5,000. Accordingly the statute would not apply when separate and distinct transactions are involved.

Nothing in the history of the present National Stolen Property Act reflects an intention by Congress to change the rule of the *Andrews* case or to vary the common-law rule that separate petty larcenies could not be aggregated so as to make up the felony of grand larceny. See *The King v. Petrie*, 1 Leach C. C. 294. Furthermore, a single interstate shipment of goods worth $3,000 does not, as a matter of federal law, constitute a crime. Nor does a subsequent such shipment worth $3,000 violate the federal statute. *In the absence of an agreement or conspiracy or overall plan*, two non-criminal acts cannot retroactively be made an offense by aggregation.

This is reinforced by the repeated use of the phrases "series of transactions" and "series of violations," as the Court of Appeals notes in its summary of legislative history (pp. A6-A7, *infra*). The plain meaning of "series" denotes a succession of events having some connection or co-ordination, conforming to some overall arrangement, as the World Series in baseball. It is wholly inconsistent with

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Cong., 2d Sess. p. 2. The Senate adopted a bill with the $1,000 amount, but the House now insisted on the $5,000 figure and prevailed. See H. R. Rep. No. 1462, 73d Cong., 2d Sess. p. 2; H. R. Rep. No. 1599, 73d Cong., 2d Sess. p. 3.

The House version of the bill ". . . added a provision which authorizes Federal jurisdiction in the case of a series of transactions involving property of a total value of $5,000 or more." H. R. Rep. No. 1462, *supra*.

the "separate and distinct" formulation under which petitioners were tried.

We submit therefore that the interpretation of this statute is a fitting and proper exercise of the certiorari jurisdiction of this Court. Lower court judges have expressed confusion and need guidance on the meaning to be ascribed. The question is made doubly important in that the National Stolen Property Act superimposes a federal offense in matters of traditional and general state jurisdiction. Delicate questions of federal-state relations are affected by the expansion of the scope of federal criminal legislation. See, *e.g.*, Schwartz, Federal Criminal Jurisdiction and Prosecutors' Discretion, 13 Law and Contemp. Prob. 64 (1948). All these factors operate to make this a case in which the writ of certiorari ought to be granted.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Of Counsel.

June 1959.

Appendix.

APPENDIX A.

Opinion Below.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 160—October Term, 1958.

(Argued December 4, 1958 Decided April 21, 1959.)

Docket No. 25328

UNITED STATES OF AMERICA,
Appellee,

—*v.*—

MAX SCHAFFER, NORMAN SCHAFFER, BENJAMIN T. MARCO and HYMAN KARP,
Defendants-Appellants,

ANTHONY STRACUZZA, MARIO STRACUZZA and DOROTHY STRACUZZA,
Defendants.

Before: SWAN, MEDINA and WATERMAN, *Circuit Judges.*

Appeal from the United States District Court for the Southern District of New York, Thomas F. Murphy, *Judge.*

Max Schaffer, Norman Schaffer, Hyman Karp and Benjamin T. Marco appeal from a judgment convicting them of knowingly transporting stolen goods in interstate com-

merce in an amount exceeding $5,000 in violation of 18 U. S. C. Section 2314. No opinion below. Affirmed.

JOHN T. MORAN, New York, N. Y., Assistant United States Attorney (Arthur H. Christy, United States Attorney and George I. Gordon, Assistant United States Attorney, New York, N. Y., on the brief), *for appellee.*

JACOB KOSSMAN, Philadelphia, Pa. (Irving W. Coleman, Northampton, Pa., on the brief), *for Max Schaffer and Norman Schaffer, defendants-appellants.*

HARRIS B. STEINBERG, New York, N. Y., *for Hyman Karp and Benjamin T. Marco, defendants-appellants.*

MEDINA, *Circuit Judge:*

Defendants-appellants Max Schaffer, Norman Schaffer, Benjamin T. Marco, and Hyman Karp were convicted of violating Section 2314 of title 18, United States Code by knowingly transporting stolen merchandise consisting of ladies' and children's wearing apparel of a value in excess of $5,000 in interstate commerce.[1] Appellants were tried together to a jury on two indictments, only the first of which is relevant here. The second indictment, containing a single count charge of conspiracy to violate 18 U. S. C. Section 659, by receiving and concealing goods stolen in interstate commerce, of a value of more than $100, knowing the same to have been stolen was dismissed at the close of the prosecution's case.

The first indictment is in four counts. Count one charges defendants Max and Norman Schaffer and three

1. 18 U. S. C. Section 2314 provides:

"Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud * * *

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both * * *"

other defendants, Anthony (Tony) Stracuzza, Mario Stracuzza and Dorothy Stracuzza, with knowingly transporting stolen merchandise between the Southern District of New York and Lebanon, Pennsylvania, during the period from May 15, 1953 to and including July 27, 1953. Count two charges a similar violation by the Stracuzzas and Marco, the transportation taking place between the Southern District of New York and Bluefield, West Virginia, during the period from June 11, 1953 to and including July 27, 1953. Count three charges a similar offense by the Stracuzzas and Karp, the transportation occurring between the Southern District of New York and Fall River, Massachusetts, during the period from May 21, 1953 to and including July 27, 1953. The fourth count charges the four appellants and the three Stracuzzas with a conspiracy to transport stolen merchandise in interstate commerce during the period from September 1, 1952 to October 20, 1954.

Tony and Mario Stracuzza pleaded guilty prior to trial and the indictment of Dorothy Stracuzza was severed and pending at the time of the trial. At the conclusion of the prosecution's case, which took a little over two weeks to present, each of the appellants rested without calling any witnesses in his behalf. The Court, on motions made by the appellants, dismissed the conspiracy count. The substantive counts went to the jury, the principal issue being whether or not each defendant knew that the goods he received from the Stracuzzas was stolen. Each defendant was found guilty of the substantive charge made against him. The two Schaffers and Karp were each sentenced to two years imprisonment, and each was fined $10,000. Marco received a sentence of four years imprisonment and a fine of $10,000. All appellants were released on bail pending appeal.

The Government proved that each appellant, a retail garment store owner, entered into a standing agreement with Tony Stracuzza by which merchandise was shipped to him at substantial discounts, previously agreed upon.

This merchandise was stolen by Mario Stracuzza, Tony's brother and assistant, who induced various truck drivers to turn the goods over to him for a share of the profits. Such practices had been going on for several years and this illegal business had been initially operated by Sol Eisenberg and Hymie Berk. At first acting in a subordinate capacity with Eisenberg and Berk, Tony along with his brother Mario later formed a partnership with Berk in September 1952 and did business under the name A. Finkel. This partnership lasted until March 1953. Each of the appellants did business with Berk and Eisenberg and all but Marco did business with A. Finkel.

In May 1953 Tony and Mario set out on their own and began operations under the name A. Schafler. It is the appellants' dealings with this concern that are the basis of the indictment. Goods were sent to each appellant at rates 55-65% of the original manufacturer's price. According to agreement Tony Stracuzza sent each appellant the original manufacturers' invoices with each shipment. Max and Norman Schafler visited each of Stracuzza's various establishments on several occasions and they saw both the merchandise and the manufacturers' invoices. Karp also visited all establishments but A. Schafler's and Marco dealt personally with Stracuzza at Berk and Eisenberg's and at A. Schafler's. The wealth of other evidence produced on trial need not be detailed at this point but will be alluded to as it becomes relevant.

Appellants make the following points: (1) that it was error to refuse to dismiss the indictment and to direct a verdict of acquittal in favor of each appellant on the ground that the aggregation of the value of various shipments was permitted despite the fact that no single shipment to any appellant was of a value of $5,000;[2] (2) that

2. Appellants Karp and Marco also claim that it was error with respect to them to submit the substantive charges against them to the jury because of the alleged absence of proof that the merchandise sold to them was stolen.

it was error to submit any of the substantive charges to the jury in view of the dismissal of the conspiracy count, due to the prejudicial effect on each appellant of the evidence admitted in support of the conspiracy count and the evidence received against each of the other appellants in support of the substantive charges; and (3) that it was error to refuse to direct a mistrial because of allegedly prejudicial and improper comments made by the prosecutor in his summation to the jury.

We shall discuss these contentions *seriatim*, but find no merit in any of them.

The Propriety of Aggregating Shipments

It is conceded that no shipment to any appellant was worth as much as $5,000. On the other hand, it is agreed that if shipments may be aggregated, the statutory requisite is far exceeded.[3] The judicial authority on this point is rather meager and we think with good reason.[4] For the answer has been spelled out in no uncertain terms in the statute and in the legislative history.

Section 2311 of title 18, U. S. C. furnishes the basic definitions used in the chapter on stolen property which includes sections 2311 through 2317. It is there provided:

> "'Value' means the face, par, or market value, whichever is the greatest, and the aggregate value of all goods, wares, and merchandise, securities, and money referred to in a single indictment shall constitute the value thereof."

That the statute means precisely what it says is shown by the following excerpts from the relevant Congressional reports:

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3. The evidence indicates that the goods purchased and transported by the Schaffers were worth wholesale $19,531.52; by Karp, $17,175.24; by Marco, $23,080.14.

4. See *Andrews v. United States*, 4 Cir., 1939, 108 F. 2d 511; cf. *United States v. Segelman*, W. D. Pa., 1949, 86 F. Supp. 114.

H. R. Rep. 1462, 73d Cong., 2d sess., p. 2 (1934)—

> "As reported by your committee, the jurisdiction of the Federal Government is limited to cases in which the value of the stolen property is $5,000 or more, except in cases of pledging or accepting in pledge such property for a loan in which case the minimum is set at $500. *There is added a provision which authorizes Federal jurisdiction in the case of a series of transactions* involving property of a total value of $5,000 or more." (Emphasis added.)

The reason for the $5,000 limitation is given in this same report. It continues:

> "It is believed that it would place too great a burden on the Department of Justice to ask it to undertake to apprehend and prosecute every person violating the substantive provisions of such a law without regard to the amount of property involved. The minimum valuations fixed in the bill required to give the Federal Government judisdiction are the figures asked and recommended by the Attorney General."

H. R. Rep. 1599 (Conference Report), 73d Cong., 2d sess., p. 3 (1934) contains the following:

> "The second amendment of the House added, also, a provision which authorizes Federal jurisdiction in the case of a series of transactions involving property of a total value of $5,000 or more. The Senate agreed to the amendment."

H. R. Rep. 422, 76th Cong., 1st sess., pp. 1-2 (1939)—(in amending the Stolen Property Law) reads:

> "It is to be noted, in this connection, that under the terms of section 5 of the Act in the event the defendant is charged with a series of violations, the aggregate value of the property referred to in the indictment may be taken to make up the minimum valuation."

As the "series of transactions" between the Stracuzzas and each appellant related to stolen merchandise of "the aggregate value of more than $5,000, the case clearly meets the statutory test.

Appellants appear to contend that each of the shipments was separate and distinct from the others as they cite *Andrews v. United States*, 4 Cir., 1939, 108 F. 2d 511, a case where transactions involving values less than $5,000 were aggregated, as the conspiracy established in that case "gave them unity for the purpose of the statute." By way of dictum (p. 514) it was said that "transactions which are entirely separate and distinct cannot be grouped for the purpose of establishing a value within the statute." We need not now decide what ruling should be made in a case where the transactions are truly "separate and distinct." Much may depend upon the facts of a particular case. Here, however, it is perfectly clear that the shipments with respect to each appellant were not "separate and distinct." Although the overall conspiracy between the Stracuzzas and the four appellants was not established, the proofs disclose as to each appellant a sufficient "unity for the purpose of the statute." All goods acquired by each appellant were acquired from the same distributor, Tony Stracuzza; all goods were acquired at the same discount according to a pre-arranged agreement; all shipments included within the indictment as to each appellant were concentrated within a specified time of no more than two and one-half months; each shipment had the same origin and destination; the merchandise shipped was all of the same type, ladies' and children's wear; and each appellant in negotiating with the Stracuzzas contemplated a number of transactions.

Appellants admit that the Congress seems to have intended to permit aggregating shipments to meet the $5,000 requirement. But they urge that such a construction might make acts which were "innocent when done" criminal upon the occurrence of subsequent events, i.e. other acts of a similar nature. Such retrospective criminality is then

likened to the doctrine of trespass *ab initio*, a doctrine repeatedly repudiated by the Supreme Court. *McGuire v. United States*, 1927, 273 U. S. 95, 98-99; *Zap v. United States*, 1946, 328 U. S. 624, 629; *On Lee v. United States*, 1952, 343 U. S. 747, 751-52.

There is no merit whatever in this contention. Nor are we able to perceive how the transportation of stolen goods knowing them to have been stolen could be regarded as "innocent when done," regardless of the amount involved. The only reason for the $5,000 limitation is to avoid overtaxing the Department of Justice. There is no legitimate interest of appellants which the Congress sought to protect by this requirement. Hence it is perfectly rational to consider past acts in determining whether any appellant's conduct is important enough to warrant prosecution by the Department of Justice.

Finally, the Supreme Court's rejection of the doctrine of trespass *ab initio* is both irrelevant and cited out of context. In the cases cited *supra* the Court was faced with the problem of whether or not the Government could use evidence lawfully obtained after a lawful entry if, subsequent to the lawful entry, the agents who obtained the evidence committed unlawful acts unconnected with the obtaining of the evidence sought to be introduced. In each instance the Court held that the Constitution did not prevent the Government from using the evidence and that the subsequent unlawful acts did not affect the entry so as to "taint" the evidence. The policy considerations underlying the doctrine of trespass *ab initio*, i.e., to punish tortfeasors and to aid their victims, were found inapplicable to the situations there presented. In the case before us there is no "innocent" act being "tainted" by subsequent occurrences; there is no legitimate interest of appellants worthy of protection; and the Congress has a very definite stake in curbing such socially undesirable conduct. Hence we conclude there is no reason for construing the clear mandate of the Congress in any way other than that which was intended.

Appellants Karp and Marco claim that the $5,000 requirement of the statute was not met as they say there was no proof that any particular merchandise purchased by them was stolen. Indeed, they appear to assert that as Mario Stracuzza was the man who induced the truck drivers to steal the original packages and sell them to him, and as Mario did not testify, the whole case collapsed. We think it clear beyond peradventure of doubt on this record that, as testified by Tony Stracuzza, all the merchandise he dealt with as "distributor" was stolen merchandise. The collation of the various proofs of this fact vis-a-vis appellants Karp and Marco would be a work of supererogation.

Were Appellants Prejudiced by the Joint Trial

Were it not for the conspiracy count, it would have been clearly erroneous to try the appellants together under Rule 8(b), Fed. R. Crim. P.[5] For there would be no common participation "in the same act or transaction constituting an offense" which is a requisite to joinder. See *Kotteakos v. United States*, 1946, 328 U. S. 750; *McElroy v. United States*, 1896, 164 U. S. 76; *Brooks v. United States*, 5 Cir., 1947, 164 F. 2d 142. However, the allegation of a conspiracy count meets the requirements of Rule 8(b) and hence at the outset the joinder was proper and within the discretion of the trial court. *United States v. Ball*, 1896, 163 U. S. 662; *United States v. Lebron*, 2 Cir., 1955, 222 F. 2d 531, cert. denied, 350 U. S. 876; *United States v. Cohen*, 2 Cir., 1941, 124 F. 2d 164, 165, cert. denied *sub nom. United States v. Bernstein*, 315 U. S. 811.

5. Rule 8(b) provides:

(b) *Joinder of Defendants.* Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Moreover, it is not claimed, nor could it be with any show of reason, that the conspiracy count was alleged by the prosecution in bad faith.

Accordingly, as provided in Rule 14, Fed. R. Crim. P.,[6] we must determine on this appeal whether appellants, or any of them, were prejudiced by the joinder. *Berger v. United States*, 1935, 295 U. S. 78; *United States v. Chieppa*, 2 Cir., 1957, 241 F. 2d 635, cert. denied *sub nom. Ivicola v. United States*, 353 U. S. 973; *Monroe v. United States*, D. C. Cir., 1956, 234 F. 2d 49, cert. denied, 352 U. S. 873. The mere fact that the conspiracy count is dismissed at the close of the evidence by the trial judge, or that a verdict of acquittal on that count is returned by the jury, does not establish as matter of law that it was error to submit the substantive charges to the jury.

Appellants assert they were prejudiced by the joinder on two levels, general and specific. The Shaffers are content to claim that the mere idea of receiving individual treatment in a case that took over two weeks to try, involved hundreds of exhibits, numerous witnesses, and four separate defendants is so far-fetched that prejudice must be deemed to result as a matter of law. See *Kotteakos v. United States*, *supra*, 328 U. S. 750.

This contention is belied by the record which reveals several precautionary measures taken to assure defendants of a fair trial and indicates no reason whatever why the jury should have been confused. First, each defendant was represented by a separate attorney except that Max and Norman Schaffer had one common counsel. Secondly, with virtually every offer of proof, testimony or exhibit, an instruction was requested and obtained that proof admitted with respect to one defendant was not to be con-

6. Rule 14 which provides:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever relief justice requires.

sidered with respect to any other defendant. Over fifty such requests and instructions were given. Third, the witnesses were called in orderly fashion so that each group of witnesses focused on a separate defendant. This practice was uniformly observed throughout the trial with but one minor exception. Finally, the Court's charge—admitted to be fair even by appellants' attorneys—carefully reviewed the evidence pro and con with respect to each defendant. And a clear direct admonition was given to keep the three distinct charges separate and not to consider evidence bearing on one defendant against another. Thus it is plain upon the face of the transcript of the testimony that throughout the trial Judge Murphy was scrupulously careful to protect the rights of each of the defendants and to make sure that none of them suffered prejudice from the joinder.

Moreover, there was nothing intrinsically complex about either the nature of the case, or of any testimony or exhibit, nor were the instructions of Judge Murphy to the jury in the slightest degree confusing or ambiguous. We have no problem of evidence admitted against one appellant which incidentally implicates another. There was only one witness common to all defendants, Tony Stracuzza, and he gave his testimony in orderly fashion describing his business and then his relationship and his transactions with each defendant in turn. Each defendant lived in a different part of the East, except the two Schaffers who operated their store together; and there is nothing in the record to indicate that any one of them knew of Stracuzza's dealings with the others.

In the face of cautionary instructions from the trial judge, far greater possibilities of confusion have been tolerated on the premise that the jury can and will do as it is told. See *Delli Paoli v. United States*, 1957, 352 U. S. 232; *Opper v. United States*, 1954, 348 U. S. 84; *Blumenthal v. United States*, 1947, 332 U. S. 539; *Berger v. United States*, 1935, 295 U. S. 78; *United States v. Bando*, 2 Cir.,

1957, 244 F. 2d 833; *United States v. Chieppa, supra*, 2 Cir., 1957, 241 F. 2d 635, cert. denied, *sub nom. Ivicola v. United States*, 353 U. S. 973; *United States v. Lebron*, 2 Cir., 1955, 222 F. 2d 531, cert. denied, 350 U. S. 876; *United States v. Leviton*, 2 Cir., 1951, 193 F. 2d 848, cert. denied, 343 U. S. 946; *Nash v. United States*, 2 Cir., 1932, 54 F. 2d 1006, cert. denied, 285 U. S. 556; *Robinson v. United States*, D. C. Cir., 1954, 210 F. 2d 29; *Dunaway v. United States*, D. C. Cir., 1953, 205 F. 2d 23.

The case here is a far cry from the state of affairs disclosed in *Kotteakos v. United States, supra*, 328 U. S. 750. There 32 defendants were listed in the indictment and 19 were brought to trial. While one huge conspiracy was charged, there was testimony concerning eight separate conspiracies, and the trial court had not only not cautioned the jury about the possibilty of many conspiracies and the need to consider the evidence as to each separately, but it instructed the jury that it might consider the overt acts of one conspiracy as proof of the guilt of other conspirators, whether in the same conspiracy or not. Here we have but four defendants whose individuality was carefully observed and protected by both the trial judge and the prosecutor, and a state of proof that we think demonstrates that the evidence adduced against each separate defendant could readily be considered as applicable to him alone.

Appellants Karp and Marco press the point further. They assert that some evidence was received which was admissible only for purposes of establishing the conspiracy and they suggest a few specific instances of evidence received against one defendant, subject to connection as to the others, which is claimed to have been prejudicial. None of these assertions of prejudice will bear analysis.

First, it is claimed that the testimony of Tony Stracuzza to the effect that each of the appellants had purchased stolen goods from Stracuzza's former employers, Berk and Eisenberg, during a six-month period prior to the date of the conspiracy charged in the indictment related

only to establishing the conspiracy. However, it is well established that where criminal intent is an essential element of the crime charged, prior instances of a similar pattern of operation are relevant to establish scienter. See 2 Wigmore, Evidence, Section 325 (3d Ed. 1940); *United States v. Brand*, 2 Cir., 1935, 79 F. 2d 605, cert. denied, 1936, 296 U. S. 655. The proof as to these prior dealings showed the same use of manufacturers' invoices and the same substantial discounts from the manufacturers' wholesale prices as did the evidence concerning the transactions alleged in the indictment.

On the day of Stracuzza's arrest, the F. B. I. found in Stracuzza's office a number of original manufacturers' invoices and a sealed carton of merchandise addressed to Karp which contained such invoices. These exhibits were admitted into evidence, and appellants Karp and Marco assert only for the purpose of proving the conspiracy. However, it is apparent that such evidence was admissible substantively against all defendants since it tended to corroborate Stracuzza's allegedly "tainted" testimony concerning his practice of regularly including the manufacturers' invoices in his shipments.

Both Marco and Max Schaffer gave signed statements to the F. B. I. which were quite damaging to their cases, Marco's because it admitted contact with Eisenberg, Schaffer's because it was falsely exculpatory. However, in each instance the Court instructed the jury to consider the exhibit only against the defendant against whom it was offered and later repeated this admonition when the conspiracy count fell through.

Similarly, what were claimed to be humorous remarks by Marco to the effect that the goods were stolen, testimony of an employee of Marco concerning the removal of labels from A. Schafler merchandise and the insertion of new ones, an F. B. I. motion picture of Max Schaffer leaving Stracuzza's office on July 28, 1953, the day of Stracuzza's arrest, and testimony of Karp's dealing in stolen

zoot suits were all accompanied by appropriate limiting instructions by the Court.

But when these items of proof are broken down, as they were in the summations to the jury, it is clear that each item is of such a character as to affect only the person involved. For example Max Schaffer alone was depicted in the motion picture showing him inspecting merchandise and documents, claimed by the prosecution to be manufacturers' invoices, in Stracuzza's show-room; and he is the very man who, shortly after the taking of the motion picture, told the F. B. I. men that he had never been in the place. So it was with reference to Karp's dealings with the stolen zoot suits, and his telephone conversation with Stracuzza about protection. In view of the repeated instructions on the point, no member of the jury could have supposed that these fragments of the prosecution's evidence affected any other defendant than the one involved in the particular matter testified to.

At best appellants' claims of prejudice come down to a complaint about the guilty "atmosphere' built up by associating each with others so obviously guilty, and the fact that a "tainted" witness was buttressed by the independent proof relating to all defendants, instead of that relating to one alone. Of course, the fact that each appellant makes these claims somewhat weakens their force. But in the absence of any bad faith on the part of the government in bringing the conspiracy count, the repeated interim instructions and the charge of the Court protecting each defendant's individuality have been traditionally considered as sufficient safeguards for those accused of crime. We conclude that none of the defendants suffered prejudice from the joinder.

There was more than ample proof to sustain a finding that each defendant knew the goods he was buying from Stracuzza were stolen, and that is all there is to the case. The attack on Stracuzza's credibility was a formidable one, amply justified by his record; but his credibility was a question solely for the jury to determine.

The Propriety of the Prosecutor's Summation

During the course of their summation appellants sought to discredit the testimony of Tony Stracuzza by alluding to the Government's alleged breach of duty by its failure to call either Mario or Dorothy Stracuzza to corroborate his story. After pointing out that Mario's testimony would only be cumulative, that Dorothy's indictment was still pending, and that the defendants could have called them to the stand themselves had they wanted to, the prosecutor made the following comments.

> "Now in making these comments as to the conduct of the prosecution, there was some criticism as to the extent that the Government failed in its obligations to its citizens to bring out all the facts. I say to you as an assistnat United States Attorney, my job is not to convict people, but is to bring them here in court, give them a fair chance to meet the charges that the Government has presented against them.
>
> The motto on the building of the Department of Justice in Washington I think fairly indicates the attitude of the Government, as far as citizens are concerned. It reads:
>
> > 'The Government wins when justice is done its citizens in the court.'
>
> Now, of course, if you believe that the Government has in some way or other prevented you from getting the full truth of this entire case, that it in some way here concealed the true facts pertaining to any of these defendants, you have only one duty—you have to march right into that jury-room and acquit every one of these defendants."

Far from inserting the prosecutor's personal integrity into the case, these extracts demonstrate a commendable candor and sense of fair play by the Government in permitting the jury to draw inferences from the evidence or lack thereof. Thus calling attention to the duties of a

prosecutor did not constitute any representation of the prosecutor's integrity. It was no more than a legitimate and proper answer to an argument advanced in the summation of appellants' counsel. Moreover, the trial judge later properly instructed the jury that no unfavorable inference could be drawn as to Stracuzza's testimony from the Government's failure to call other witnesses in view of the fact that these witnesses were equally available to the defense.

Affirmed.

APPENDIX B.

Judgment Below.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty first day of April one thousand nine hundred and fifty nine.

Present:

HON. THOMAS W. SWAN,
HON. HAROLD R. MEDINA,
HON. STERRY R. WATERMAN,
Circuit Judges.

United States of America,
Plaintiff-Appellee

v.

Max Schaffer, Norman Schaffer, Hyman Karp and Benjamin T. Marco,
Defendants-Appellants

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO,
Clerk.

APPENDIX C.

Order.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

United States of America,
Appellee,

-against-

Max Schaffer, Norman Schaffer, Benjamin T. Marco, Hyman Karp,
Defendants-Appellants,

Anthony Stracuzza, Mario Stracuzza, Dorothy Stracuzza,
Defendants.

Before: SWAN, MEDINA and WATERMAN, *Circuit Judges.*

On Petition for Rehearing on behalf of appellants Max Schaffer and Norman Schaffer; and, alternatively, Motion to Stay Issuance of Mandate and to Continue Bail.

Irving W. Coleman, Northampton, Pa., and Jacob Kossman, Philadelphia, Pa., for appellants, Max and Norman Schaffer.

PER CURIAM.

Petition for rehearing denied.

Motion to stay issuance of mandate and to continue bail granted.

/s/ THOMAS W. SWAN,
/s/ HAROLD R. MEDINA,
/s/ STERRY R. WATERMAN,
C.J.J.

May 18, 1959.